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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUL 26 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses	)	
Section 214 Authorizations from	)	CC Docket 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee	)	

**REPLY COMMENTS OF  
FOCAL COMMUNICATIONS CORPORATION,  
ADELPHIA BUSINESS SOLUTIONS, AND  
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.  
RE: PROPOSED CONDITIONS**

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## SUMMARY

The initial comments raise a host of concerns that demonstrate that the Commission should not approve the merger with the conditions proposed by SBC/Ameritech. The overwhelming and numerous inadequacies in the proposed conditions pointed out by commenters indicate that the Commission should essentially scrap these proposals in their entirety and, if it does not deny the merger, establish a process that it more likely to result in conditions that could genuinely offset the detriments to competition that it would cause. As is clearly demonstrated in the comments, the proposed conditions are unlawful in certain respects, vague to the extent that they will guarantee litigation rather than any public interest benefits, are weaker in many respects than the Applicants' initial proposal, provide tools for SBC/Ameritech to thwart competition, and appear in certain respects to insulate the companies from significant regulatory review of their compliance with key market opening rules.

The Joint Commenters believes that the best course of action would be for the Commission to conclude that the Applicants have made a good faith effort but have been unable to fashion the merger so that it would promote the public interest. The Commission is under no obligation to negotiate further with ABC/Ameritech so that they can get their anticompetitive proposal approved. At this point, the Commission should simply deny the application.

If the Commission approves the merger, it should do so only with a substantially more aggressive approach to conditions that would assure that the merger could serve the public interest. If it elects to proceed with further consideration of the application, the Commission should reject the proposed conditions *in toto* and establish a process that does not involve exclusive negotiations with the Applicants.

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Focal Communications Corporation ("Focal"), Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions ("Adelphia"), and McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") (collectively, "Joint Commenters"), by undersigned counsel, hereby submit their Reply Comments regarding the conditions proposed to the Commission (the "Merger Conditions") in connection with the merger application of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech"). Nearly all the comments submitted in this proceeding were in accord with the Joint Commenters' conclusion that the proposed merger conditions are deeply flawed and should either be re-worked or the merger application rejected.<sup>1</sup>

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<sup>1</sup> See, e.g., Comments of Coved Communications; Comments of CoreComm; Comments of ALTS; Comments of AT&T, Comments of MCI WorldCom, Comments of CompTel; Joint Comments of Winstar Communications and Teligent; Comments of Time Warner Telecom Holdings; Comments of Sprint Communications; Comments of Texas Office of Public Utility Counsel; Comments of Texas Rural Municipal Utilities.

**I. THE PROPOSED MERGER CONDITIONS ARE NOT IN THE PUBLIC INTEREST**

As the Comments in the proceeding have made clear, there are a number of fundamental problems with the proposed merger conditions. As an initial matter, implementation of the proposed merger conditions is unlikely to work as envisioned because they rely upon inadequate provisioning and enforcement mechanisms. Furthermore, implementation of the merger conditions would provide the companies with regulatory benefits not afforded to the un-merged entities. This is evident from the fact that the merger conditions contain provisions that are more permissive than Commission rules or the Act, that simply require compliance with existing laws and regulations, and that prejudge pending regulatory issues or are contrary to the Act. As a result, instead of creating incentives for enhanced competition as envisioned by the Commission, the implementation of these merger conditions as written would have the effect of further concentrating the market power of these ILECs and providing them with new opportunities to delay meaningful competition.

The number and magnitude of the problems with the merger conditions pointed out by the commenters in this proceeding demonstrate that the merger conditions as proposed would not mitigate the anticompetitive impacts of the proposed merger on extent that would warrant its approval. The Joint Commenters therefore urge the Commission to reject these proposals in their entirety and, either deny the merger outright, or establish procedures that would permit all interested parties to negotiate directly with SBC/Ameritech. This would be more likely to result in conditions that could genuinely offset the detriments to competition that would be caused by this merger. If the Commission does decide to approve the merger, the conditions should be strengthened

significantly, with an emphasis on the adoption of appropriate enforcement mechanisms to help assure that the letter and spirit of the conditions prevail.

## **II. SEVERAL OF THE MERGER CONDITIONS ARE CONTRARY TO THE ACT**

As many of the commenters have pointed out, there are several ways in which the proposed merger conditions either contradict settled commission precedent and policy, or pre-judge pending issues. For example, several commenters have pointed out that the limitations on promotional discounts violate the Act because they limit the number of discounted loop, resale, and platform offerings made available to CLECs.<sup>2</sup> This clearly violates the "pick and choose" rule of Section 252(i) because it precludes CLECs from obtaining a network element "on the same terms and conditions" as all other CLECs.<sup>3</sup> Furthermore, the merger conditions permit SBC/Ameritech to implement its 25% average discount across a broad geographic area.<sup>4</sup> The structure of this discount would give the Applicants the ability to offer different discounts in different areas, potentially even to different CLECs in the same state, as long as the total average discount is 25% when measured across all states. This would permit the merged entity to target its discounts in those geographic areas which are less likely threaten its hold on its most lucrative markets.

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<sup>2</sup> Comments of AT&T at 15; Comments of MCI WorldCom at 51-53; Comments of CompTel at 15-18; Comments of Covad at 61.

<sup>3</sup> 47 U.S.C. § 252(i).

<sup>4</sup> *Proposed Conditions for FCC Order Approving SBC/Ameritech Merger*, App. A at 2.

The proposed merger conditions would also limit the use of discounted loops to provision of residential local exchange service. This condition is a facial violation of Section 51.503(c), which provides that "[t]he rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier provides." This condition is also in conflict with the Commission's determination that UNEs may be used to provide exchange access services.<sup>5</sup>

In addition, as pointed out by the Joint Commenters and others, authorization of the proposed advanced services separate affiliate is contrary to the language and structure of the Act and would prejudice pending rulemaking proceedings.<sup>6</sup> In addition, the Joint Commenters agree that the separate SBC/Ameritech advanced services affiliate contemplated in the merger conditions will be a successor or assign under Section 251(h)(1) of the Act and would, therefore, be subject to the key market-opening provisions of Section 251(c). Thus, for example, the proposed merger conditions would permit the new advanced services affiliate to use SBC/Ameritech trade names, engage in joint marketing, and receive asset transfers. If the Commission does not reject the separate affiliate

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<sup>5</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 356 (1996); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 12460, ¶¶ 38-39 (1997).

<sup>6</sup> Comments of Joint Commenters at 9-13; Comments of AT&T at 18; Comments of Level 3 Communications at 10; Comments of Sprint at 19-20.

condition, it should state that the separate affiliate contemplated by the Applicants would be fully subject to Section 251(c) obligations.

### **III. THE ADVANCED SERVICES AFFILIATE CONDITION SHOULD BE REJECTED**

The Joint Commenters believe that the unlawfulness of the advanced services affiliate proposal, discussed above, is sufficient to warrant Commission rejection of the condition. In addition, the ability of ILECs to employ advanced services affiliate as proposed in this merger proceeding is also a critical issue in the pending *Advanced Services Rulemaking*. In that rulemaking the Commission is set to decide the rules governing deregulated advanced services affiliates. Permitting the Applicants to employ an advanced services affiliate in the manner proposed here cannot help but prejudice the outcome of that proceeding.

The Joint Commenters submit that the present merger conditions are not the proper vehicle for deciding whether to establish a mandatory deregulated advanced services affiliate serving one third of the nations access lines. The Joint Commenters agree with those commenters that expressed their concern about the unusual procedures by which the present proposed conditions were developed.<sup>7</sup> The Joint Commenters are further alarmed by the indications that the proposed merger conditions actually foreshadow the decision that the Commission may make in the *Advanced Services Rulemaking*. The Joint Commenters suggest that the Commission take a more sound approach for dealing with issues shared by the two proceedings, such as issuing a further notice in

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<sup>7</sup> Comments of AT&T at 1, 5-6; Comments of Sprint at 2-3.



the *Advanced Services Proceeding* soliciting comments on the implications of the proposed merger condition. Absent this sort of approach, the Commission should simply reject the proposed advanced services separate affiliate condition.

#### **IV. THE CONDITIONS WILL NOT PROMOTE OUT-OF-REGION COMPETITION**

As the Comments in this proceeding have made abundantly clear, implementation of the proposed merger conditions is unlikely to work as envisioned because the conditions rely upon inadequate provisioning and enforcement mechanisms. Of special concern are the weak and flawed enforcement mechanisms. For example, the Applicants propose conditions that they claim would require some level of out-of-region competition. In the first instance, the level of competition required by the merger conditions, one customer per market, does not even support the pretense of lasting competition, let alone amount to competition which is likely to truly benefit consumers. Furthermore, even if these conditions work as advertised, they expire after only three years. That would not even be enough time to resolve any complaints of non-compliance, let alone ensure permanent changes in the marketplace. Thus, as the nearly unanimous sentiments of the commenters in this proceeding indicate, it is clear to participants in the competitive telecommunications industry that the proposed conditions could not counterbalance the permanent loss of true out-of-region competition that the Applicants were planning prior to their proposed merger.

#### **V. THE CONDITIONS MUST BE IN EFFECT FOR A LONGER PERIOD OF TIME**

It is certainly possible that some manner of temporary conditions could counterbalance permanent loss of competition between SBC and Ameritech. However, for all the reasons raised

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in the comments in this proceeding and as described below, these proposed conditions simply will not do so. The Joint Commenters do not believe that the Commission could rationally conclude, based on the record, that the proposed temporary conditions would serve the public interest.

In the event that the Commission decides to attempt to refine the merger, it should start by making most of the conditions preconditions. Furthermore, rather than have the conditions expire, they should instead be made permanent requirements, or at least of substantially longer duration. For example, there is no rational reason why SBC/Ameritech could not be required to demonstrate compliance with existing requirements, such the collocation and OSS requirements, or why they could not provide for disclosure of loop conditioning information and offer appropriately crafted promotions *before* the merger. Most of these are already required by the Act or the Commission's rules.

The Joint Commenters submit that the Commission could not conclude, based on the record, that these conditions will serve the public interest given that any benefit to be achieved is limited to a brief period. As pointed out by several commenters, a number of conditions envision achieving compliance only a short time before the merger conditions expire. For example, OSS development is envisioned to take up to two years, and the condition expires in three years. Rather than adopting this approach, if the Commission is to rely upon conditions to protect the public from the harm to competition this merger poses, it should either make the conditions permanent or last far longer than three years.

**VI. THE PERFORMANCE STANDARDS MUST BE IMPROVED TO INCLUDE MORE MEASURES AND A MORE REALISTIC IMPLEMENTATION SCHEDULE**

In their initial comments the Joint Commenters urged the Commission to expand the performance measures contained in the "Federal Performance Parity Plan" to include additional metrics.<sup>8</sup> The Joint Commenters support MCI WorldCom's proposal regarding performance standards that blends standards used in Texas, California and other states.<sup>9</sup> The joint Commenters believe that the MCI WorldCom proposal includes standards which are vital to the development of a competitive local exchange market. The Joint Commenters stress that regardless of the source of any performance standards adopted, it is imperative that the Commission reject the current approach because it attempts to impose only minimal requirements throughout the SBC/Ameritech region. If changes to the Applicants' standard operating procedures must be made in order to implement a particular standard in a state, then such changes should be required prior to merger approval.

**VII. THE PROPOSED CONDITIONS PROVIDE NEW OPPORTUNITIES FOR THE APPLICANTS TO DELAY MEANINGFUL COMPETITION**

The Joint Commenters concur that the conditions could actually be harmful to competition by providing SBC/Ameritech with new opportunities for discrimination and delay.<sup>10</sup> The stated purpose of the conditions is to promote public interest benefits that counterbalance the harms to

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<sup>8</sup> Comments of Joint Commenters at 22-23.

<sup>9</sup> Comments of MCI WorldCom at 11-25, Attachment 1.

<sup>10</sup> Comments of AT&T at 15-17; Comments of CompTel at 2-3; Comments of MCI WorldCom at 51; Comments of Sprint at 42.

competition otherwise caused by the merger. Unfortunately, as discussed above, the conditions are so weak in most respects that they will achieve only very limited and temporary benefits, if any benefits are achieved at all.

As discussed above, the proposed promotional discount conditions violate Section 252(i) of the Act and the Commission's rules that prohibit discrimination in provision of UNEs based on the services provided over them by CLECs. In addition, the proposed merger conditions will permit SBC/Ameritech to strategically target its discount so long as it maintains a 25% region-wide average. This provides SBC/Ameritech with a new tool for guiding and directing competition to states and regions where it will have the least affect on their market dominance. The Joint Commenters submit that granting the Applicants this discretion will damage competition without any mitigating public interest gains. Imposition of across-the-board discounts would at least assure some benefit from the discounts, even though they are otherwise severely limited in scope by the proposed caps. As drafted, however, the discretion afforded to the Applicants as to where to offer the discounts assures that there will be minimal or no competitive benefits.

As the Joint Commenters and many others have pointed out,<sup>11</sup> the proposed collocation compliance plan is unlikely to actually promote compliance with the Commission's rules, but instead is more likely to provide SBC/Ameritech a with yet another tool for skirting the Commission's rules and insulating these carriers from regulatory scrutiny. The plan calls for the Applicants to employ

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<sup>11</sup> Comments of Level 3 at 4-6; Comments of Sprint at 62-63; Comments of MCI WorldCom at 25-26; Comments of Joint Commenters at 17.

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a private audit process of their own design, and for the preparation of a report by an auditor who is not independent of the Applicants. The report will then be touted by the Applicants as proof that they have fully complied with the Commission's collocation rules. Given the past experience the Joint Commenters and many other commenters have had with the Applicants, reliance upon this process would be misguided.

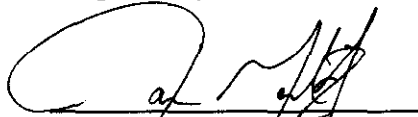
It is certainly true that there is an important role for an impartial audit in assuring compliance with collocation rules. In order to provide for such an audit, the Commission will need to change the proposed merger conditions to establish collocation compliance as a precondition, specify the scope of the audit, provide that the auditor may not have been employed, or be employed in the future by the Applicants, and provide that the auditor may not express any opinions as to whether SBC/Ameritech has complied with the Commission's rules. Instead of releasing the Applicants from regulatory oversight, as apparently contemplated by the merger conditions, the Commission should make clear that it and the states shall continue to enforce collocation requirements regardless of any audit reports.

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### VIII. CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully request that the Commission modify the proposed Merger Conditions as recommended herein. Absent such modifications, the proposed merger should not be found to serve the public interest and should be rejected in its entirety.

Respectfully submitted,



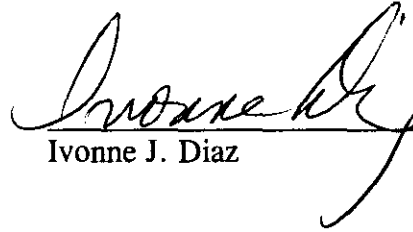
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Dated: July 26, 1999

**CERTIFICATE OF SERVICE**

I, Ivonne J. Diaz, hereby certify that on this 26th day of July 1999, copies of the foregoing Reply Comments of Focal Communications Corporation, Adelphia Business Solutions, and McLeodUSA Telecommunications Services, Inc. were hand delivered to those parties marked with an asterisk. All others were served by first class mail.

  
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